FILED

NOT FOR PUBLICATION

SEP 10 2008

MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARTIN CHAVEZ-CUEVAS,

Defendant - Appellant.

No. 06-30383

D.C. No. CR-00-00033-1-BLW

MEMORANDUM*

Appeal from the United States District Court for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Submitted September 8, 2008**

Before: TASHIMA, SILVERMAN, and N.R. SMITH, Circuit Judges.

Martin Chavez-Cuevas appeals from the district court's decision, following a limited remand under *United States v. Ameline*, 409 F.3d 1073, 1084-85 (9th Cir. 2005) (en banc), that it would not have imposed a different sentence had it known

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

that the Sentencing Guidelines were advisory. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Chavez-Cuevas contends that the district court erred by adding one criminal history point for a drunk driving conviction he never sustained. This contention fails because the prior conviction was proven by a preponderance of the evidence, using sufficiently reliable information. *See United States v. Marin-Cuevas*, 147 F.3d 889, 894-95 (9th Cir. 1998). Moreover, any error is harmless because even if Chavez-Cuevas received one less criminal history point his advisory sentencing range would be the same. *See United States v. Cantrell*, 433 F.3d 1269, 1279-80 & n.4 (9th Cir. 2006).

We also conclude that the district court did not clearly err when it determined, by a preponderance of the evidence, that Chavez-Cuevas was responsible for 34.33 kilograms of methamphetamine. *See United States v. Kilby*, 443 F.3d 1135, 1140-41 (9th Cir. 2006).

Chavez-Cuevas's contention that the district court misapplied the Sentencing Guidelines by giving him three criminal history points for committing the instant offense while under a criminal justice sentence, pursuant to U.S.S.G. § 4A1.1(d), and less than two years following his release from confinement, pursuant to U.S.S.G. § 4A1.1(e), is not properly before this court. *See United States v. Combs*,

470 F.3d 1294, 1297 (9th Cir. 2006); *cf. United States v. Thornton*, 511 F.3d 1221, 1227 (9th Cir. 2008) (recognizing that the appellant's sentencing issues were properly before the court on appeal from an *Ameline* remand only because the appellant raised the issues in his initial appeal to this court).

AFFIRMED.